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No. 89-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

BYWATER NEIGHBORHOOD ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
CRESCENT CITY COMMUNICATIONS COMPANY,
INC. OF DELAWARE, AND NOTEL, INC.,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does the Hobbs Act preclude a federal district court from exercising jurisdiction over actions against the Federal Communications Commission to enforce the National Historic Preservation Act and the National Environmental Policy Act until after the FCC has granted an operating license for a television microwave tower, at which time the environmental damage — construction of the tower — will have already occurred?

(2) Did the Fifth Circuit err in holding that non-federal entities acting under authority of a federal license could not be joined in an action to enforce the National Environmental Policy Act and the National Historic Preservation Act, even though joinder is necessary to provide complete relief?

PARTIES TO THE PROCEEDING

The parties are:

Petitioner:

Bywater Neighborhood Association*

Respondents:

The Federal Communications Commission, William J. Tricarico, in his capacity as Secretary, Federal Communications Commission, Crescent City Communications Company, Inc. of Delaware, and Notel, Inc.

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*As required by Rule 28.1 of this Court, Petitioner states that it has no parent companies, subsidiaries, or affiliates.

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v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
CRESCENT CITY COMMUNICATIONS COMPANY,
INC. OF DELAWARE, AND NOTEL, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bywater Neighborhood Association hereby petitions this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 8, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 879 F.2d 165 (5th Cir. 1989), and

is reprinted in the Appendix, at 1a- 9a. The decision of the United States District Court for the Eastern District of Louisiana, which is not reported, is reprinted in the attached Appendix at 10a.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on August 8, 1989. An extension was granted by Justice White on November 6, 1989, extending the time within which a petition for certiorari must be filed to December 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND FEDERAL REGULATIONS INVOLVED

National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1982)

National Historic Preservation Act (NHPA), 16 U.S. §§ 470 *et seq.* (1982)

The Administrative Procedure Act, 5 U.S.C. § 703

The Administrative Orders Review Act, (The "Hobbs Act"), 28 U.S.C. § 2342 (1982)

36 C.F.R. Part 800 (1988) (Advisory Council on Historic Preservation regulations)

40 C.F.R. Part 1500 (1988) (Council on Environmental Quality regulations)

The statutory and federal regulatory provisions involved are reprinted in the Appendix, at 1a-28a.

STATEMENT OF THE CASE

This case presents the question of whether judicial review of the Federal Communications Commission's failure to comply with Section 106 of the National Historic Preservation Act ("NHPA" or "Section 106"), 16 U.S.C. § 470f (12a) and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (13a), prior to allowing the construction of a 200-foot television microwave tower must be deferred until after an operating licensing has been issued. Such a delay would deny any meaningful judicial review of the agency's compliance with these mandatory environmental and historic review obligations since the environmentally harmful impact — construction of the tower — will have already occurred. Because the Fifth Circuit's decision conflicts with the decision of the Third Circuit in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 1980), *cert. denied sub nom., General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981), review by this Court is necessary to clarify this unsettled issue.

A. Statutory Background

NEPA and the NHPA impose mandatory requirements on federal agencies to consider the effects of their actions on historic and cultural resources before taking or authorizing any proposed action that may affect these resources. As this Court recognized in *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989), these statutory environmental review obligations "ensure[ ] that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the

decisionmaking process and the implementation of that decision." *Id.* at 1845.[1]

While NEPA's requirements for preparing, circulating, and considering an environmental impact statement are well known, some additional background on the analogous requirements of the National Historic Preservation Act, which has never heretofore been reviewed by this Court, is warranted.

The National Historic Preservation Act was enacted by Congress in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. 16 U.S.C. §§ 470(b), 470-1. In order to promote this policy, Section 106 of the NHPA prohibits federal agencies from conducting any federal "undertaking" (including any federally assisted or licensed undertaking), unless the agency, in consultation with the State Historic Preservation Officer ("SHPO"),[2] (1) takes into account the effects (including no effect) of the undertaking on historic properties on or eligible for the National Register of Historic Places; and (2) affords the Advisory Council on Historic Preservation, an independent federal agency, a reasonable opportunity to comment on the undertaking. *Id.* § 470f.[3] This consultation process is a critical aspect of Section 106, and is required even when an agency determines that its actions will have no adverse effect

[1]NEPA requires the evaluation of impacts on historic and cultural resources as part of its broader requirement that agencies evaluate the environmental effects of their proposed major actions that significantly affect the environment. 42 U.S.C. § 1502.16(g).

[2]The SHPO is the official in each state responsible for assisting federal agencies in carrying out their historic preservation responsibilities in the Section 106 consultation process, 36 C.F.R. § 800.1(c).

[3]This review and consultation process, which is set out more fully in the regulations issued by the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, must be completed as early as possible in the decisionmaking process, and in any event prior to federal approval, licensing, or funding of the project. *Id.* § 800.3(c).

on historic properties, since the agencies with expertise in historic preservation — the SHPO and the Advisory Council — must concur in any such agency determination. 36 C.F.R. § 800.5(a)-(d); 800.8(a). If the impact on historic properties is adverse, the federal agency must then consider ways in which the adverse impact can be avoided or mitigated. *Id.*, § 800.5(e). Like NEPA, the responsibility for complying with these requirements rests, by the terms of the statute, solely with the agency. 16 U.S.C. § 470f.

There is no dispute that Section 106 and NEPA apply to the FCC's decision challenged herein.[4] Rather, the sole issue is whether judicial review of the FCC's failure to comply with these statutes is available before the environmentally harmful impacts to historic properties have already occurred.

Judicial review of agency compliance with NEPA is pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 703, which does not specify the court in which NEPA claims must be brought. Generally, enforcement of NEPA has been assumed to be within the subject-matter jurisdiction of the district courts. *E.g.*, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 782-83 (1976). The NHPA, on the other hand, expressly creates a private right of action outside the APA that authorizes "civil action[s] in any United States district court by any interested person to enforce the provisions of [the NHPA]." 16 U.S.C. § 470w-4; *see Vieux Carré Property Owners, Residents & Assoc's, Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989).

As the Fifth Circuit recognized, however, special rules apply where the agency charged with violating its environmental review obligations is an agency subject to the Administrative Orders Review Act, 28 U.S.C. § 2342 (the "Hobbs Act"). The Hobbs Act expressly provides that exclusive jurisdiction

[4] *See* Letter to Crescent City Communications from Alan Schneider, Chief Auxiliary Branch, FCC (December 8, 1988). (29a).

for review of final orders of several agencies, including the FCC, lies in the Court of Appeals. 28 U.S.C. § 2342(a); *see also* 47 U.S.C. § 402(a) (the Federal Communications Act). Thus, where a final order is challenged on the grounds that is was unlawfully issued, for whatever reason (including failure to comply with a statute, such as NEPA, for which an independent source of jurisdiction exists), that action must be brought in the court of appeals. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 526-27 (1978).

However, when there has been no final agency action that is reviewable by the court of appeals, and where a NEPA violation is alleged to have occurred, the district court must have jurisdiction to order declaratory or injunctive relief if the agency violates a clear, non-discretionary duty under NEPA, and there is no other adequate remedy.[5] It is this crucial principle that the Fifth Circuit failed to follow in the decision below.

B. Factual Background

On June 22, 1988, Crescent City Communications of Delaware ("Crescent City") applied for a license from the Federal Communications Commission ("FCC") to broadcast from a 200-foot Studio Transmitter Link (STL) tower, for use in conjunction with a new television broadcast station, WCCL-TV, Channel 49 in New Orleans.[6] The tower was to be con-

[5]*See, e.g., Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (district court had jurisdiction over plaintiff's claim that the AEC failed to comply with NEPA prior to allowing interim operation of a nuclear power plant while the operating license was still pending); *City of Irving v. Federal Aviation Administration*, 539 F. Supp. 17, 34 (N.D. Tex. 1981) (claim that FAA failed to comply with NEPA was subject to review in district court when there was no order to review and the only claim was under NEPA). *See also Leedom v. Kyne*, 358 U.S. 184 (1958).

[6]An STL tower is a form of TV microwave station used by a broadcast station to send its signal from the studio to its transmitter for transmission to the general public. 47 C.F.R. § 74.601(b).

structed in the Bywater Historic District, which is listed in the National Register of Historic Places.[7]

Crescent City's application failed to disclose that the facilities were to be constructed within a historic district. To the contrary, Crescent City affirmatively represented in its application that the license would not be a "major action," despite the fact that the FCC's environmental regulations expressly define a "major action" to include "facilities that will affect districts, sites, buildings, structures or objects, . . . that are listed in the National Register of Historic Places or are eligible for listing." 47 C.F.R. § 1.1307(a)(4). As a result of this omission, no notice of the application was sent to the State Historic Preservation Officer, as is required by Section 106 of the NHPA, nor were interested members of the public, including the Bywater Neighborhood Association (the "Neighborhood Association"), put on notice of the licensing proceeding, with its attendant impacts on the historic district.[8]

The STL facility involved in this case is licensed pursuant to a "one-step" licensing process, under which the FCC has waived the requirement for a separate construction permit,

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[7]The Bywater Historic District was listed in the National Register of Historic Places on January 23, 1986. The Bywater district is located east of the historic Vieux Carre (French Quarter) along the Mississippi River in New Orleans. The residential and commercial buildings in the district date from 1807 to 1935. The architectural integrity of the district has remained substantially intact, with relatively few modern intrusions. Even the few modern buildings are no more than one or two stories tall.

[8]36 C.F.R. §§ 1.1307(a)(4); 1.1308. Likewise, the Council on Environmental Quality ("CEQ") regulations implementing NEPA require broad public notice of actions affecting the environment. *See* 40 C.F.R. §1506.6(b)(3) (agency should mail notice of action with primarily local effects to potentially interested community organizations and to state and area clearinghouses).

and an applicant files only an application for an operating license. 879 F.2d at 166 n.1 (2a). In the case of licenses which do not require a separate construction permit, the FCC's environmental regulations provide only that "environmental processing (if invoked) shall be completed before authorization of the facilities is granted." 47 C.F.R. § 1.1312.

On June 30, 1988, July 11, 1988, and November 1, 1988, the Advisory Council on Historic Preservation wrote to the FCC noting that the STL tower was to be constructed within the Bywater Historic District and reminding the agency of its obligations to comply with Section 106 prior to construction of the tower. (32a) Notwithstanding the Advisory Council's repeated requests, the FCC took no action, and construction of the tower was begun by the applicant. Accordingly, on November 16, 1988, the Neighborhood Association filed a complaint in the U.S. District Court for the Eastern District of Louisiana, seeking an injunction against further construction of the tower pending the FCC's compliance with Section 106 and NEPA.[9]

C. Proceedings Below

On December 8, 1988, the Neighborhood Association's complaint was dismissed by the district court on the ground that the D.C. Circuit had exclusive jurisdiction over appeals from FCC orders. The Fifth Circuit affirmed this holding on appeal, by opinion dated August 8, 1989. *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989).

The Fifth Circuit held that judicial review of the FCC's compliance with Section 106 and NEPA was premature until after

[9]The complaint also alleged that the FCC failed to comply with NEPA and Section 106 prior to issuing two other licenses, on May 20 and June 19, 1988, to construct and operate two satellite earth stations in the Bywater Historic District.

the FCC issued a final, appealable licensing order, even though the tower was already being constructed.[10] The Fifth Circuit also stated that the license applicants were improperly joined as defendants, reasoning that, as nonfederal entities, they would not, in any event, be subject to the NHPA, which imposes obligations only on federal agencies. 879 F.2d at 167 n.7 (3a).

Construction of the STL tower has now been completed, although the FCC has not yet issued an operating license for the tower, and has not yet evaluated the impact of the tower on the historic district or consulted with the State Historic Preservation Officer, as required by Section 106 and NEPA.[11]

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision That Judicial Review of An Agency's Failure to Comply With NEPA and Section 106 Is Not Available Until After the Agency Issues A Final Licensing Order Is Incorrect, and Is in Direct Conflict with the Third Circuit.

The FCC's own environmental regulations clearly require it to assess the impacts of the 200-foot STL tower on the Bywater Historic District, and to consult with the State

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[10] The Fifth Circuit also held that the Neighborhood Association must first exhaust its administrative remedies before it could seek judicial review of the FCC's failure to comply with NEPA and Section 106 in licensing the satellite earth stations, by filing a petition before the FCC to revoke the licenses. 879 F.2d at 169. This petition does not seek Supreme Court review of the Fifth Circuit's ruling with respect to the satellite earth stations.

[11] Final FCC action on the operating license fo the STL tower was deferred pending resolution of an objection asserted by the Neighborhood Association that compliance with NEPA and Section 106, albeit after-the-fact, is still required. (2a).

Historic Preservation Officer, in compliance with Section 106 and NEPA. 47 C.F.R. §§ 1.1307(a)(4); 1.1308; 1.1312. The FCC violated its plain, nondiscretionary duty to comply with Section 106 and NEPA by allowing construction of the STL tower to occur prior to complying with these mandatory environmental review statutes.[12] This failure fundamentally undermines the "action-forcing" purpose of these statutes by increasing the risk that an after-the-fact environmental review will not adequately inform the FCC's final licensing decision, "a risk that arises in part from the practical fact that bureaucratic decisionmakers . . . are less likely to tear down a nearly completed project than a barely started project." *Sierra Club v. Marsh*, 872 F.2d 497, 501 (1st Cir. 1989).[13]

Despite these clear, statutory violations, the Fifth Circuit held that the Neighborhood Association was foreclosed from seeking judicial review to prevent construction of the tower pending compliance with Section 106 and NEPA, on the grounds that the FCC had not yet issued a final "order." Under the Fifth Circuit's approach, judicial review would always be "premature" until the FCC issued its final licensing order, even though construction of the tower — and therefore the increased risk of harm to the historic district that NEPA and Section 106 are designed to prevent — would have already occurred. 879 F.2d at 169 (8a).

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[12]The FCC purports to justify its failure to comply with Section 106 prior to construction of the tower by asserting that it only licenses the operation, not the construction, of auxiliary broadcast stations, such as STL towers. However, this is contradicted by the FCC's own environmental regulations, which recognize that the primary environmental impact is the construction of the facility, not its operation. Thus, the FCC's regulations categorically exclude from the environmental review process the licensing of new antennas on existing buildings or towers. 47 C.F.R. §1.1306 n.1.

[13]*See* Part II, *infra*.

The Fifth Circuit's holding that judicial review of the Neighborhood Association's claims under NEPA and Section 106 was not available until after the FCC issued its final licensing order is in direct conflict with the decision of the Third Circuit in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom., General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981), involving a violation of NEPA under circumstances virtually identical to those here. In that case, the Third Circuit held that the district court had jurisdiction over an action alleging that the Nuclear Regulatory Commission ("NRC") had violated NEPA when it informally authorized the discharge of contaminated water by the owner of a nuclear power plant prior to complying with NEPA, notwithstanding the fact that the NRC's after-the-fact compliance with NEPA would become reviewable by the court of appeals when the NRC issued a final licensing order.[14]

The need for district court review is even more pronounced where, as here, review is sought of an agency's failure to comply with the consultation and review requirements of Section 106. As the Fifth Circuit specifically acknowledged, a "tension exists" between the commands of Section 106 and the special statutory review procedures of the Hobbs Act. 879 F.2d at 168. (6a) The assessment of the aesthetic and other impacts resulting from construction of a 200-foot tower on the architectural and cultural characteristics of the Bywater Historic District is clearly not a matter within the expertise of the FCC, and the FCC's assessment of these effects would not be entitled to any particular deference by the reviewing

[14]To further confuse matters, the D.C. Circuit has apparently adopted a third approach, which would allow citizens to obtain review while the license decision is pending, but would vest exclusive jurisdiction in the court of appeals. *See General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096, 1099 (1981) (Rehnquist, J., dissenting) (citing *City of Rochester v. Bond*, 603 F.2d 168, 936-37 (D.C. Cir. 1979)).

court. Rather, Section 106 mandates that this assessment take place in consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation, who are the true agency experts on these issues and whose views are subject to deference by the courts.[15] Moreover, these determinations are governed by the Advisory Council's objective regulatory criteria for assessing adverse effects, not by the FCC's regulations.[16]

In any event, it is critical that this Court resolve this split in the circuits, since this issue has widespread implications for other "Hobbs Act" agencies which have adopted "streamlined" or "expedited" licensing procedures that allow environmentally harmful actions to occur prior to compliance with Section 106 or NEPA.[17]

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[15]*See Preservation Coalition v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982); *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784, 791 (S.D. Ohio 1982).

[16]36 C.F.R. § 800.9. Likewise, the concern that *de novo* district court review would be duplicative of the agency's review does not apply where, as here, the agency has refused or failed to comply with Section 106 altogether. To the contrary, *de novo* judicial review is all the more essential where the question of the agency's compliance rests on factual matters such as the assessment of effects on historic properties and whether the agency has provided the proper notification of the SHPO and the Advisory Council. These are issues for which no administrative record would exist to enable appellate review.

[17]*See, e.g., Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663 (9th Cir. 1989), *petition for cert. filed sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 58 U.S.L.W. 3336 (U.S. Oct. 30, 1989) (No. 89-701) (Ninth Circuit held that it had no jurisdiction to review ICC order denying petition for reconsideration filed by preservation group claiming that ICC failed to comply with NEPA and Section 106 before it authorized the abandonment of a historic railroad under the ICC's abbreviated "exempt" abandonment procedures, 49 C.F.R. § 1152.50).

II. Resolution of This Case Is Important in Order to Ensure that NEPA and Section 106 Rights Are Preserved.

As was noted earlier, central to NEPA and Section 106 is the requirement that these mandatory environmental and historic impact reviews be conducted as early as possible in the licensing process, before environmentally harmful actions are taken, and while the widest feasible range of alternatives is open for consideration. 36 C.F.R. § 800.3(c); 40 C.F.R. §§ 1501.2; 1506.1. Indeed, the regulations of the Advisory Council on Historic Preservation expressly provide that completion of a project prior to seeking the Advisory Council's views forecloses the Council's opportunity to comment on the undertaking. 36 C.F.R. § 800.6(d).

The irreparable harm that results from such foreclosures is rooted in the simple logic that "it is far easier to influence an initial choice than to change a mind already made up." *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983). Completion of an environmentally harmful project prior to the evaluation of its impacts and alternatives undermines NEPA's core objective — minimizing the risk to the environment resulting from decisionmakers who are unaware of the environmental consequences of their actions. As the First Circuit explained in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989),

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, . . . ***NEPA's object is to minimize . . . the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers . . . are less likely to tear down a nearly completed project than a barely started project.***

Id. at 500-01 (emphasis added).

In recognition of the "action-forcing" nature of Section 106 and NEPA, the courts have not hesitated to enjoin agencies from authorizing environmentally harmful activities during the pendency of a licensing proceeding prior to compliance with NEPA. For example, in ***Susquehanna Valley Alliance***, the Third Circuit held that the NRC violated NEPA when it informally authorized the discharge into the Susquehanna River of contaminated water that had accumulated in the Three Mile Island nuclear reactor following the cold shutdown of the plant after the March, 1979 accident, on the ground, ***inter alia***, that the NRC had unlawfully authorized this discharge outside of the licensing process without first complying with NEPA. The court reasoned that

> by fragmentating [sic] its consideration the NRC postpones preparation of an impact statement until after private parties have been permitted to expend large sums on construction, the resulting change in the status quo has the almost inevitable effect of distorting the later view of both the agency and the reviewing court as to the desirability of the action in question.

Susquehanna, 619 F.2d at 240.[18]

The Fifth Circuit's decision, by precluding judicial review of NEPA and Section 106 violations until after the environmen-

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[18]*See also Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1127 (D.C. Cir. 1971) (AEC should not be permitted to foreclose alternative solutions by delaying environmental impact statements); *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 291 (D.D.C. 1971) (The district court enjoined interim operation of a nuclear power plant while the operating license application was still pending, because the AEC clearly violated its "nondiscretionary legal duty" to comply with NEPA prior to allowing this environmental impact to occur.)

tal harm has occurred, undermines these mandatory environmental review statutes. This Court's review is therefore needed in order to ensure that the right to meaningful enforcement of agency compliance with NEPA and Section 106 are not further eroded.

III. The Fifth Circuit's Ruling That the Court Lacked Jurisdiction Over the Non-Federal Defendants Creates a Split in the Circuits As to Whether Non-Federal License Applicants Can Be Joined As Defendants Where Joinder is Necessary to Enforce Compliance with NEPA and Section 106.

Relying on its earlier decision in *Vieux Carré Property Owners, Residents, & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-563), the Fifth Circuit stated that "were it possible for the Neighborhood Association to go forward with this action, the private defendants, Crescent City and Notel, would be dismissed." 879 F.2d at 167 n.7. (3a) This result is in direct conflict with the opinions of the Tenth and Ninth circuits in *Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988), and *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977), which upheld the joinder of non-federal defendants in lawsuits challenging federal agency action (or inaction) in permitting non-federal entities to go forward with environmentally harmful projects absent federal compliance with environmental laws.[19]

[19]Indeed, the courts have routinely and without question permitted the joinder of non-federal license applicants who are actually carrying out federally funded or licensed projects, where the federal agency has failed to comply with NEPA or Section 106, in recognition that joinder of the non-federal defendants in such cases was necessary to afford complete relief to the parties. *See, e.g., Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3d Cir. 1983) (non-federal defendants en-

The power of the federal government to impose reasonable conditions on the use of federal privileges has been characterized by this Court as "beyond challenge." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958). One such inherently reasonable condition is Section 106's mandate that agencies assess the impact of a project on historic resources before issuing any permit or license that will affect historic resources. As the Fifth Circuit earlier recognized in *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1027 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972), to allow nonfederal entities to proceed with federally-authorized projects where the federal agency has failed to comply with federal environmental protection laws "would be giving approval to the circumvention of an Act of Congress," thereby implicating "the fundamental principle" of "[t]he supremacy of federal laws." 446 F.2d at 1027. Unless courts have the power to enjoin nonfederal licensees, the mechanisms specifically designed by Congress for judicial enforcement of the NHPA, 16 U.S.C. § 470w-4, will be undermined.

Accordingly, because jurisdiction over the nonfederal entities is necessary to afford the Neighborhood Association com-

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joined pending HUD compliance with NHPA and NEPA); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (private timber cutting and mining company enjoined National Park Service's compliance with NEPA); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (S.D. Cal. 1985) (private developer enjoined pending Army Corps' compliance with NHPA and NEPA); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp 784 (S.D. Ohio 1982) (Court enjoined private land-owner from constructing a barge-loading facility near a historic site, due to the Army Corps' failure to comply with Section 106 prior to issuing a permit under Section 10 of the Rivers and Harbors Act); *Save the Courthouse Committee v. Lynn*, 408 F. Supp. 1323, 1344 (S.D..N.Y. 1975) (non-federal defendant enjoined from proceeding with urban renewal project due to HUD failure to comply with NHPA and NEPA).

plete relief, regardless of the forum in which the action must be brought, Supreme Court review is necessary to clarify this issue as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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December 6, 1989

BYWATER NEIGHBORHOOD ASSOCIATION,
Plaintiff-Appellant,

v.

William J. TRICARICO, in his capacity as Secretary, Federal Communications Commission, Crescent City Communications Company, Inc., of Delaware, and Notel, Inc.,
Defendants-Appellees.

No. 88-3901

Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1989.

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Bywater Neighborhood Association ("Bywater") seeks the removal of two structures it considers inconsistent with the character of its neighborhood, a national historic district. The two structures are a 200-foot television microwave tower, owned and built by Crescent City Communications Company, Inc. ("Crescent City"), and a satellite earth station, owned and built by Notel, Inc., a firm related to Crescent City. The Federal Communications Commission ("FCC"), together with local authorities, is the regulatory body with authority to issue

licenses for the operation of both facilities.[1] The FCC has already issued a license for the satellite earth facility, now constructed and operational. However, it has "deferred" action on the operating license for the television transmitter, although the tower itself has been built under the "one-step" licensing procedure.

The gravamen of Bywater's complaint is that the FCC failed to adhere to the dictates of the National Historic Preservation Act ("NHPA") and to its own regulations, which require it to consult with the NHPA Advisory Council with regard to the potential effect the structure might have upon the Bywater National Historic District. Bywater contends that the FCC's failure in this regard was, in part, the result of Crescent City and Notel's having withheld important facts concerning the area in which they were to build. Bywater brought this suit against the FCC, Crescent City, and Notel under the Administrative Procedure Act ("APA"),[2] the Declaratory Judgment Act,[3] the National Historic Preservation Act,[4] and the Mandamus and Venue Act.[5] The district court dismissed the suit for want of subject-matter jurisdiction. We affirm.

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[1]The FCC explains that it also requires a license for the construction of certain types of facilities. However, for both facilities at issue here, "streamlined" application processes were available: Notel was able to submit one application for both the construction and operation of the satellite earth station. For the television microwave tower, Crescent City took advantage of an available "one-step" process under which there is no requirement that the applicant receive a construction permit, although the applicant cannot operate the facility without a license. Applicants that, like Crescent City, use this procedure take the risk that the license will be denied and the structure thereby will become useless for transmitting purposes.

[2] 5 U.S.C. § 701 *et seq.*

[3]28 U.S.C. § 2201 *et seq.*

[4]16 U.S.C. § 470*et seq.*

[5]28 U.S.C. § 1361

I.

Bywater correctly observes that the NHPA expressly permits private suits outside the APA review process; it points to 16 U.S.C. § 470w-4, which provides that attorney's fees, expert witness fees, and other costs may be awarded.[6] In *Vieux Carre Property Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989), we held that section 470w-4 does in fact create a private right of action that can be brought by an interested person, but only against the agency, since the NHPA, by its terms, can be violated only by an agency.[7]

Bywater seeks to compel the FCC's compliance with the following NHPA provision:

> [T]he head of any Federal ... agency having authority to license any undertaking shall, ... prior to the issuance of any license, ... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

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[6]Section 470w-4 reads, in its entirety,

> In any civil action brought in any United States Court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

[7]Hence, were it possible for Bywater to go forward with this action, the private defendants, Crescent City and Notel, would be dismissed.

Here, however, it is the FCC which Bywater accuses of neglecting its NHPA duties, and in suits against that agency, special rules apply. Those rules are found in 28 U.S.C. § 2342[8] and 47 U.S.C. § 402(b),[9] which vest *exclusive* jurisdiction over appeals from the FCC's final orders in the respective circuit

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[8]Section 2342 provides,

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of —
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
>
> *****

[9]Section 402(b) provides:

> *****
>
> (b) Appeals may be taken from decisions and orders of the [FCC] to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> (2) By any applicant for the renewal or modification of any such instrument of authorization, whose application is denied by the Commission.
>
> (3) By any party to any application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
>
> (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
>
> *****
>
> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

courts of appeals[10] and, in the case of licensing decisions, in the District of Columbia Circuit alone.[11] The Supreme Court has declared that "[l]itigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939, 80 L. Ed. 2d 480 (1984) (citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 91 S. Ct. 203, 208, 27 L. Ed. 2d 203 (1970)). Yet that is precisely the purpose of Bywater's suit. The association's plea before this court is that we "maintain District Court jurisdiction over both facilities so that, in the event that the FCC denies and/or revokes permits for their operation, their removal from the Historic District can be assured."

In *ITT World Communications*, ITT brought its claim against the FCC under the APA, 5 U.S.C. § 703,[12] arguing that the court of appeals was an inadequate forum because the record

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[10]*See South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107, 1114 (5th Cir. 1984) ("the exclusive method for obtaining judicial review of FCC action is a direct appeal to the court of appeals pursuant to [the applicable statute]").

[11]*See infra* Part II.

[12]Section 703 provides as follows:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

had not been fully developed. The court, rejecting that argument, observed that the court of appeals could remedy any deficiencies in the record with a remand to the agency. 466 U.S. at 469. Hence, the Court declared, the APA was not a proper vehicle for circumventing the special statutory review process.

That is not the last word, however, since the private right of action arising under the NHPA might be an alternative basis for Bywater's suit in district court. Thus, some tension exists between section 470w-4, as construed in *Vieux Carre*, and the specific statutory provisions governing appeals of FCC decisions. We resolve that tension in favor of Congress's specific and obvious intent to restrict to the circuit courts any appeals from rulings of the FCC. Though we have construed section 470w-4 to create a private right of action that may be brought in "any U.S. District Court," *Vieux Carre*, at 458, we find no intent in the legislative history of that section to override the special provisions concerning the FCC.[13] We follow the lead of the court in *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979), in recognizing that

> Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur.... If ... there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive

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[13]The House Report states simply,

> The intent is to ensure that property owners, non-profit organizations and interestered individuals who may otherwise lack the means for court action be awarded reasonable loss for actions taken under this Act. The intent is not to award costs for frivolous suits against Federal agencies.

H.R. No. 1457, 9th Cong., 2d Sess. 46 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6378, 6409.

means of obtaining judicial review in those cases to which it applies.

Indeed, any doubts we might have about Congress's intent in these matters is resolved in the APA, which states, "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5. U.S.C. § 703.

For similar reasons, we must also reject the Mandamus and Venue Act and the Declaratory Judgment Act as independent predicates for district court jurisdiction in this case.[14] Aside from our adherence to the general principle that Congress's exclusive and specific review procedure should be followed, we observe that the Mandamus and Venue Act also fails to confer jurisdiction in that "it is an extraordinary remedy that is not available when review by other means is possible." *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) (citing *Kerr v. United States Dist. Court*, 426 U.S. 394, 403, 96 S. Ct. 2119, 2124, 48 L. Ed. 2d 725 (1976)). Likewise, where Congress has created a specific mode of judicial review of administrative orders, declaratory relief under 28 U.S.C. § 2201 is not available to those who have not pursued that remedy. *See American President Lines, Ltd. v. Federal Maritime Bd.*, 235 F.2d 18 (D.C. Cir. 1956). Our courts "recognized early in the development

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[14]Bywater would also have us premise jurisdiction upon the old workhorse, 28 U.S.C. § 1331. But Congress may, as 47 U.S.C. § 401(a) and (b) indicate, narrow that jurisdiction; to the extent that Bywater argues that the district court could retain "residual federal question jurisdiction" on the ground that the agency's violation might be found a patent abuse of its authority or a manifest infringement of a substantive right, we must reject that jurisdictional basis also. Nothing precludes Bywater from obtaining immediate remedies from the District of Columbia Circuit. *See Tennessee Dep't of Employment Sec. v. Secretary of Labor*, 801 F.2d 170, 175 n.8 (6th Cir. 1986).

of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge." *Port of Boston Marine Terminal Ass'n*, 400 U.S. at 68, 91 S. Ct. at 208 (citing *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907)).[15]

II

For specified litigants appealing FCC orders, courts have interpreted 47 U.S.C. § 402(b) to allow venue only in the District of Columbia Circuit. *See FCC v. Columbia Broadcasting Sys.*, 311 U.S. 132, 136, 61 S. Ct. 152, 153, 85 L. Ed. 87 (1940); *Campos v. FCC*, 650 F.2d 890, 892 (7th Cir. 1981). Bywater's complaint falls within category (6) of section 402(b), which provides that appeals may be taken before the District of Columbia Circuit "[b]y any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection." In Bywater's prayer to this court, it admits that it would be "premature," because Bywater has not yet exhausted its administrative remedies, for this court or the district court *a quo* to act until the FCC has issued an order with respect to

[15]We note that by any such reasoning, we do not thereby defeat any private right of action that may exist against *other* agencies not in compliance with the NHPA. Nothing in our opinion should be read as precluding Bywater, or similar associations aggrieved by an agency's failure to follow the NHPA's procedures, from bringing suit against that agency in the district court. *See, e.g., Vieux Carre* (suit against Army Corps of Engineers); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 278-82 (3d Cir. 1983) (action against Department of Housing and Urban Development). But where, as here, Congress has established exclusive procedures for judicial review of a particular agency's actions, we are bound to follow those dictates. *See Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S.Ct 551, 558 13 L.Ed.2d 386 (1965).

Crescent City's application and a final order, after entertaining Bywater's petition to revoke, with respect to Notel's license. Instead, Bywater asks that we "maintain jurisdiction" until these events have occurred. But if and when those events occur, Bywater's complaint will fall squarely within section 402(b)(6), and venue will lie only in the District of Columbia Circuit. Hence, any order from our court requiring the district court to "preserve" jurisdiction pending issuance of the FCC's final orders would be futile. The district court therefore properly dismissed Bywater's suit.

III

The district court correctly determined that it was without jurisdiction to hear this complaint against the FCC. When the FCC's final orders have been issued, Bywater must follow the path Congress has laid out for judicial review of those decisions. We note that our ruling should in no way be read as a comment on the merits of Bywater's claims against the FCC.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BYWATER NEIGHBORHOOD ASSOCIATION	*	CIVIL ACTION
VERSUS	*	NO. 88-5086
WILLIAM J. TRICARICO, ET AL	*	SECTION "D" (5)

ORDER OF DISMISSAL

In this action, Plaintiffs seek a declaratory judgment decreeing that the Federal Communications Commission has failed to comply with the provisions of the National Historic Preservation Act and the National Environmental Policy Act and all FCC and advisory council regulations promulgated thereunder and an injunction enjoining the FCC and Crescent City Communications Company, Inc. of Delaware from construction of a certain TV microwave tower and a further mandatory injunction enjoining the FCC and Notel, Inc., ordering them to remove a certain domestic satellite earth station in New Orleans, Louisiana, plus attorney fees and costs.

On December 7, 1988, the court heard Motions by Defendants to Dismiss. After considering the argument of counsel and the memorandum submitted by the parties, this court finds it lacks jurisdiction because Plaintiff has failed to exhaust its appropriate administrative remedies and furthermore, challenges to FCC licensing matters including applications for construction permits lie exclusively within the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. See, 47 U.S.C. § 402(b)(1) and (6); *FCC v. ITT World Communications*, 466 U.S. 463, 468 (1984) and *Telecommunications Research & Action Center v. FCC*, 750

F.2d 70, 75 (D.C. Cir. 1984).

Accordingly, this matter is hereby DISMISSED for lack of jurisdiction.

New Orleans, Louisiana, this 8 day of December, 1988.

/s/ A. J. McNamara
UNITED STATES DISTRICT JUDGE

National Historic Preservation Act (NHPA)

16 U.S.C. § 470f

§ 470 of Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470w-4

§ 470-4 Attorneys' fees and costs to prevailing parties in civil actions

In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Section 102 of the National Environmental Policy Act (NEPA)

42 U.S.C. § 4332

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the

views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

The Administrative Procedure Act

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity or judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

The Hobbs Act

28 U.S.C. § 2342

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
>
> * * * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

The Federal Communications Act

47 U.S.C. § 402(b)

§ 402 Judicial review of Commission's orders and decisions — Procedure

* * * *

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the Holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

Regulations of the Federal Communications Commission (FCC)

47 C.F.R. § 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (*see* §§ 1.1308 and 1.1311) and may require further Commission environmental processing (*see* §§ 1.1314, 1.1315 and 1.1317):

* * * *

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (*See* 16 U.S.C. 470w(5); 36 CFR 60 and 800).

NOTE: The National Register is updated and re-published in the FEDERAL REGISTER each year in February. To ascertain whether a proposal affects a historical property of national significance, inquiries also may be made to the appropriate State Historic Preservation Officer, *see* 16 U.S.C. 470a(b); 36 CFR Parts 63 and 800.

* * * *

(c) If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (*See* § 1.1313). The Bureau shall review the petition and consider the environmental concerns that have

been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (*see* § 1.1308 and 1.1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

(d) If the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA. The Bureau will review and consider the EA as in paragraph (c) of this section.

47 C.F.R. § 1.1308 Consideration of environmental assessments (EAs); findings of no significant impact.

(a) Applicants shall prepare EAs for actions that may have a significant environmental impact (*see* § 1.1307). An EA is described in detail in § 1.1311 of this part of the Commission rules.

(b) The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect. To assist in making that determination, the Bureau or the Commission may request further information from the applicant, interested persons and agencies and authorities which have jurisdiction by law or which have relevant expertise.

> NOTE: With respect to actions specified under § 1.1307(a)(3) and (a)(4), the Commission shall solicit and consider the comments of the Department of Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation, respectively, in accordance with their established

procedures. *See* Interagency Cooperation-Endangered Species Act of 1973, as amended, 50 CFR Part 402; Protection of Historic and Cultural Properties, 36 CFR Part 800. In addition, when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe. *See* § 1.1307(a)(5).

(c) If the Bureau or the Commission determines, based on an independent review of the EA and any applicable mandatory consultation requirements imposed upon federal agencies (*see* note above), that the proposal will have a significant environmental impact upon the quality of the human environment, it will so inform the applicant. The applicant will then have an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems. See § 1.1309. If the environmental problem is not eliminated, the Bureau will publish in the FEDERAL REGISTER a Notice of Intent (*see* § 1.1314) that EISs will be prepared (see §§ 1.1315 and 1.1317), or

(d) If the Bureau or Commission determines, based on an independent review of the EA, and any mandatory consultation requirements imposed upon federal agencies (*see* the note to paragraph (b) of this section), that the proposal would not have a significant impact, it will make a finding of no significant impact. Thereafter, the application will be processed without further documentation of environmental effect. Pursuant to CEQ regulations, see 40 CFR 1501.4 and 1501.6, the applicant must provide the community notice of the Commission's finding of no significant impact.

47 C.F.R. § 1.1309 Application amendments.

Applicants are permitted to amend their applications to reduce, minimize or eliminate potential environmental pro-

blems. As a routine matter, an applicant will be permitted to amend its application within thirty (30) days after the Commission or the Bureau informs the applicant that the proposal will have a significant impact upon the quality of the human environment (*see* § 1.1308(c)). The period of thirty (30) days may be extended upon a showing of good cause.

* * * *

47 C.F.R. § 1.1311 Environmental information to be included in the environmental assessment (EA).

(a) The applicant shall submit an EA with each application that is subject to environmental processing (*see* § 1.1307). The EA shall contain the following information:

(1) For antenna towers and satellite earth stations, a description of the facilities as well as supporting structures and appurtenances, and a description of the site as well as the surrounding area and uses. If high intensity white lighting is proposed or utilized within a residential area, the EA must also address the impact of this lighting upon the residents.

(2) A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect.

(3) A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in local community.

(4) A discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects, and any alternative sites or facilities which have been or might reasonably be considered.

(5) Any other information that may be requested by the Bureau or Commission.

* * * *

(b) The information submitted in the EA shall be factual (not argumentative or conclusory) and concise with sufficient detail to explain the environmental consequences and to enable the Commission or Bureau, after an independent review of the EA, to reach a determination concerning the proposal's environmental significance (e.g., wilderness areas, wildlife preserves, natural migration paths for birds and other wildlife, and sites of historic architectural, or archeological value). In the case of historically significant sites, it shall specify the effect of the facilities on any district, site, building, structure or object listed, or eligible for listing, in the National Register of Historic Places. It shall also detail any substantial change in the character of the land utilized (*e.g.*, deforestation, water diversion, wetland fill, or other extensive change of surface features). In the case of wilderness areas, wildlife preserves, or other like areas, the statement shall discuss the effect of any continuing pattern of human intrusion into the area (*e.g.* necessitated by the operation and maintenance of the facilities).

* * * *

47 C.F.R. § 1.1312 Facilities for which no construction permits is required.

In the case of facilities for which no construction permit is required or for which a waiver request for a construction permit has been granted under 47 U.S.C. 319(d), the information required by § 1.1311 shall be submitted and ruled on by the Commission, and the environmental processing (if invoked) shall be completed before authorization of the facilities is granted.

47 C.F.R. § 1.1313 Objections.

(a) In the case of an application to which section 309(b) of the Communications Act applies, objections based on environmental considerations shall be filed as petitions to deny.

(b) Informal objections which are based on environmental considerations must be filed prior to grant of the construction permit, or prior to authorization for facilities that do not require construction permits, or pursuant to the applicable rules governing services subject to lotteries.

Regulations of the Advisory Council on Historic Preservation

36 C.F.R. § 800.1 Authorities, purposes, and participants.

(a) *Authorities.* Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertaking on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these

responsibilities, commonly called the section 106 process.

(b) *Purposes of the section 106 process.* The Council seeks through the section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest.

36 C.F.R. § 800.1(c) Participants in the section 106 process—

(2) *Interested Person*

(ii) *Applicants for Federal assistance, permits, and licenses.* Where the undertaking subject to review under section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the section 106 process in the manner prescribed in these regulation.

36 C.F.R. § 800.2(o)

(o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

36 C.F.R. 800.3(c)

(c) *Timing*. Section 106 requires the Agency Official to complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule for the undertaking.

36 C.F.R. § 800.5 Assessing effects.

(a) *Applying the Criteria of Effect*. In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (§ 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

(b) *When no effect is found*. If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the findings, which shall be available for public inspection. Unless the State

Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in § 800.5(c) are followed.

* * * *

(e) *When the effect is adverse.* If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

Regulations of the Council on Environmental Quality (CEQ)

40 C.F.R. § 1506.1

§ 1506.1 Limitations on actions during NEPA process

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either

of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

December 6, 1988

IN REPLY REFER TO:
8930-CFD

Crescent City Communications Company, Inc.
7300 Lakeshore Drive, #28
New Orleans, Louisiana 70124

In re: TV STL Station (New)
BPTS-880711ME
BLTS-880711MF
New Orleans, Louisiana

Gentlemen:

This concerns your referenced application, FCC Form 313, filed on July 11, 1988, seeking authorization for an STL for TV station WCCL, New Orleans, Louisiana. For the reasons presented below, action on your application will be deferred.

As indicated in the December 5, 1988 letter of your attorney, Barbara R. Merlie, it appears that grant of your application will be a major action under Section 74.1307(a) of the Commission's Rules. *See* 47 C.F.R. Section 74.1307(a) (1987). Your attorney further advised that, an Environmental Assessment ("EA") is being prepared and will be submitted to the Commission as part of your application. The proposed site of the transmitter tower for the STL is located in the Bywater National Register District. That district is significant in American history and has been listed as such since January

23, 1986. Therefore, pursuant to Sections 1.1307(a)(3) and 1.1311 of the Commission's Rules, the EA is required. 47 C.F.R. Sections 1.1307(a)(3) and 1.1311 (1987). You are requested to submit the required EA within thirty days of the date of this letter. Action on your application will be deferred pending receipt of the EA.

We would also like to take this opportunity to advise you that Section 74.24 of the Rules would not provide you with authority to operate the STL on a short-term basis prior to the grant of the subject application. *See* 47 C.F.R. Section 74.24 (1987). That section of the Rules applies only to Part 73 licensees, not permittees. 47 C.F.R. Sections 74.24(a) and (d) (1987). Further, your application indicates that the proposed antenna would consist of a 200 foot tower. This exceeds the threshold limitations of Section 74.24(e) of the Rules. 47 C.F.R. Section 74.24(e) (1987). Finally, Section 74.24(b) of the Rules requires conformance with all normally applicable regulations. 47 C.F.R. Section 74.24(b) (1987). Hence, until an EA is filed and considered you would not be in compliance with all applicable regulations.

In light of the above, even if you were granted a station license for WCCL-TV before action on the referenced application was taken, you could not operate the STL on a short-term basis under Section 74.24 of our Rules.

Even assuming that Section 74.24 of the Rules applied, however, we are hereby suspending the provisions of that section pending resolution of the matter raised by the Bywater Neighborhood Association. Consequently, any operation of the STL must await specific authorization by this office.

We appreciate your prompt attention to these matters and share your attorney's desire to seek a quick and efficient resolution of the problems presented in this proceeding.

Sincerely,

/s/Alan J. Schneider, Chief
Auxiliary Services Branch
Audio Services Division
Mass Media Bureau

cc: Robert Fink
Barbara Merlie, Esq.
James Derbes, Esq.

Advisory Counsel on Historic
Preservation
The Old Post Office Building
1100 Pennsylvania Ave., NW, #809
Washington, DC 20004

Reply to: 730 Simms Street, Room 450
Golden, Colorado 80401

November 1, 1988

Ms. Eileen Chaney
Consumer Assistance &
Small Business Division,
Office of Public Affairs
Federal Communications Commission
Washington, D.C. 20554

REF: FCC permit issuance to broadcast from a location within the Bywater Historic District, New Orleans, Louisiana

Dear Ms. Chaney:

I am writing this as a follow-up to your response to my letter of June 30, 1988, to the Secretary about the above-referenced undertaking. In your letter dated July 27, 1988, you noted that an application is pending before the FCC Mass Media Bureau and that you were forwarding a copy of my letter to that office for consideration.

Subsequent to your response, we have not heard from anyone within FCC regarding the issuance of a Federal license or permit. This lack of response gives us concern because we understand from local residents that the applicant intends to initiate the FCC-licensed broadcasting effort in the next few weeks, just as soon a [sic] transmission tower can be erected and made operational within the historic district.

It appears to the Council that the erection of a tower allegedly 195 feet in height is a necessary outgrowth of the FCC's license to broadcast. A structure of this type and scale would likely be out of character with this and other nearby historic districts within the city and, as such, would affect the district of districts.

Section 106 of the National Historic Preservation Act and the Council's implementing regulations, 36 CFR Part 800, require that Federal agencies take into account the effects of their actions on historic properties and, if an effect is determined, afford the Council an opportunity to comment. Our files to date demonstrate that the FCC has not taken into account the potential direct and indirect effects of its issuance of a license or permit upon historic properties listed or determined eligible for inclusion in the National Register of Places [sic] and afforded the Council and opportunity to comment. We urge the FCC to give this compliance matter its urgent attention in order that the compliance requirements of Section 106 of the Act may be met in a timely manner.

Sincerely,

/s/ Robert Fink
Director, Western Office
of Project Review